1992

State of Utah v. C. Dean Larsen : Brief of Petitioner

Utah Supreme Court

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IN THE UTAH SUPREME COURT

STATE OF UTAH,	:	
Plaintiff/Respondent,	:	Supreme Court No. 920114
v.	:	Court of Appeals No. 900473-CA
C. DEAN LARSEN,	:	Category No. 14
Defendant/Petitioner.	:	

BRIEF OF PETITIONER

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ON CERTIORARI REVIEW OF A DECISION AND JUDGMENT
OF THE UTAH COURT OF APPEALS

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STATEMENT OF JURISDICTION

By its August 14, 1992, order the Utah Supreme Court accepted certiorari review of this action. The Court has jurisdiction pursuant to Utah Code Ann. §§ 78-2-2(3)(a) and 78-2-2(5).

STATEMENT OF ISSUES

1. Is scienter--the intent to defraud, deceive or manipulate--an element of the crime of securities fraud under Utah Code Ann. §§ 61-1-1(2) and 61-1-21? A trial court's interpretation of statutory law is reviewed for correctness. State v. James, 819 P.2d 781, 796 (Utah 1991).

2. Is expert testimony, concluding that an alleged misrepresentation or omission is "material," inadmissible in a prosecution for securities fraud under Utah Code Ann. § 61-1-1(2)? While decisions to admit evidence are reviewed for "abuse of discretion", "[w]hether a piece of evidence is admissible is a

question of law, and we always review questions of law under a correctness standard . . . . [I]t is possible that we might refer casually to this standard of review as an 'abuse of discretion' standard. In fact, it is not." State v. Ramirez, 817 P.2d 774, 781-82 n.3 (Utah 1991).

CONTROLLING PROVISIONS

Utah Code Ann. § 61-1-1:

> It is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly to:
>
> (1) employ any device, scheme, or artifice to defraud;
>
> (2) make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
>
> (3) engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

Utah Code Ann. § 61-1-21:

> (1) A person who willfully violates any provision of this chapter except Section 61-1-16, or who willfully violates any rule or order under this chapter, or who willfully violates Section 61-1-16 knowing the statement made to be false or misleading in any material respect, shall upon conviction be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> (2) No person may be imprisoned for the violation of any rule or order if he proves that he had no knowledge of the rule or order.

Utah Code Ann. § 61-1-27:

> This chapter may be so construed as to effectuate its general purpose to make uniform the law of those states which enact it and to coordinate the interpretation and administration of this chapter with the related federal regulation.

17 C.F.R. § 240.10b-5 ("Rule 10b-5"):

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

Rule 704, Utah Rules of Evidence:

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

STATEMENT OF THE CASE

A. Nature of the Case

This action involves a securities fraud prosecution which raises a question of first impression in Utah: Is scienter--the intent to defraud, manipulate or deceive--an element of the crime of securities fraud under Utah Code Ann. §§ 61-1-1(2) and 61-1-21. Under federal law on which these provisions are patterned and with which Utah's Act was intended to harmonize, it is. The Utah Court of Appeals says it is not. This appeal raises a second issue relating to the permissible scope of expert opinion regarding the materiality of alleged omissions in securities offering materials. At trial, the government was permitted, over objection, to present the "expert" testimony of Sherwood Cook that certain facts allegedly not disclosed to investors were "material."

B. Course of Proceedings and Disposition of the Court of Appeals

The government charged Mr. Larsen with securities fraud under the above provisions, alleging that he misrepresented or omitted material facts in connection with the offer, sale or purchase of securities. (Ct. App. Opinion at 4).[1] Mr. Larsen asked the trial court to instruct the jury that an intent to

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[1]The official decision of the Utah Court of Appeals issued on February 7, 1992. A copy is attached as Appendix A. It was published at 828 P.2d 487 (Utah Ct. App. 1992).

defraud is an element of the charges and that his good faith is a defense. (Defendant's Requested Jury Instructions Nos. 4-5, 30, R. 1353-56, 1381, attached as Appendix B). This was refused. (Appendix B). The jury was told instead that it is enough to convict a person for securities fraud in Utah simply if he or she acts "willfully": "When it is his conscious objective or desire to engage in the conduct or cause a result." (Instructions to the Jury, Nos. 14, 17 and 17A, R. 1309, 1312-13, Appendix C).[2]

On June 20, 1990, the jury convicted Mr. Larsen. On February 7, 1992, the Utah Court of Appeals affirmed the trial court, rejecting the view that intent to defraud is an element of a criminal violation of §§ 61-1-1(2) and 61-1-27. (Ct. App. Opinion at 13-14, Appendix A). The Court of Appeals also found that the trial court did not err in admitting Mr. Cook's testimony. (Ct. App. Opinion at 10-11, Appendix A).

C. Statement of Facts

Facts necessary to review the issues appear in text.

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[2]The trial court granted a Certificate of Probable Cause on March 4, 1991. The court expressed concern that specific intent is an added element of securities fraud with which Mr. Larsen was charged. (Transcript of Proceedings, February 19, 1991, pp. 47-48, Appendix D).

SUMMARY OF THE ARGUMENT

1. Intent to Defraud is an Element of a Violation of §§ 61-1-1 and 61-1-21

The Court of Appeals decision that intent to defraud is not an element of securities fraud under §§ 61-1-1(2) and 61-1-21, collides with the interpretation of the related federal provision, federal Rule X-10b-5 ("Rule 10b-5"), 17 C.F.R. § 240.10b-5, on which Utah's Act was patterned and with which Utah's law was intended to harmonize. See Utah Code Ann. § 61-1-27. A violation of Rule 10b-5 requires such intent. Consistently, good faith is a defense under Rule 10b-5. Utah's legislature intended § 61-1-1 to have the same interpretation. Contrary to this intent, the Court of Appeals holding now permits strict-liability conviction with possible imprisonment, as in this case, without proof of this intent and regardless of the actor's good faith belief. (Ct. App. Opinion at 13-14).

2. Expert Testimony on Materiality Under the Securities Law is Improper

The trial court incorrectly admitted testimony of the State's expert witness, Sherwood Cook, that certain facts Mr. Larsen allegedly omitted from securities registration disclosure documents were "material." The Court of Appeals held that the testimony was permissible because it went to "an ultimate issue of fact." In so ruling, the Court relied on vacated case authority and misconstrued Rule 704 Utah R. Evid. which abolished

the "ultimate fact" rule. The Court of Appeals' decision conflicts with securities cases holding that expert testimony like Mr. Cook's is inadmissible.

ARGUMENT

A. Intent to Defraud is an Element of a Criminal Violation of Sections 61-1-1(2) and 61-1-21

Section 61-1-1(2), construed as intended by Utah's legislature, in harmony with United States Supreme Court decisions interpreting the related federal provision (Rule 10b-5) on which § 61-1-1 was patterned, reveals that "scienter," (the intent to defraud, manipulate or deceive)[3] is an element of the offense that the jury should have considered.

1. Section 61-1-1 Was Patterned After Rule 10b-5

In 1963, the Utah Legislature adopted (with certain revisions unimportant here) the Uniform Securities Act ("Uniform Act"). This is known as the Utah Uniform Securities Act ("Utah Act"). See Utah Code Ann. § 61-1-28. Section 101 of the Uniform Act (§ 61-1-1 of Utah's Act) was patterned after Federal Securities and Exchange Commission ("SEC") Rule X-10B-5 (Rule 10b-5). See Uniform Securities Act § 101, Official Comment, reprinted in Louis B. Loss, Commentary on the Uniform Securities

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[3]The United States Supreme Court defined "scienter," an element of a securities fraud violation under Section 10(b) and Federal Rule 10b-5, as "a mental state embracing the intent to deceive, manipulate, or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 184, 193 n.12 (1976).

Act 6 (1976). The language of the three classes of proscribed activity under § 61-1-1 and Rule 10b-5 is identical. Compare Utah Code Ann. § 61-1-1 and 17 C.F.R. § 240.10b-5; pp. 2-3 supra. Consistently, under both § 61-1-1 and Rule 10b-5, criminal penalties are set for any "willful" violation.[4] Utah Code Ann. § 61-1-21; 15 U.S.C. § 78ff.

The State has incorrectly implied that Rule 10b-5 was not the model for § 61-1-1 because the SEC, in drafting the rule, drew language from § 17a of the Securities Act of 1933 ("the 1933 Act"). While language for Rule 10b-5 was borrowed from § 17a, the intent of Rule 10b-5 was derived from § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), (not § 17a of the 1933 Act), which empowered the SEC to act and which provided the standard of liability that must be imposed. 425 U.S. at 200.[5] Rule 10b-5 "was adopted pursuant to authority granted the Commission under § 10(b) . . . to carry into effect

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[4]Mr. Larsen does not challenge the trial court's instruction on "willfulness." (Instruction No. 17, Appendix C). Willfulness is also an element of a § 61-1-1 violation. The trial court and Court of Appeals erred by refusing to instruct that scienter was a separate, additional element of the offence. See infra pp. 10-18.

[5]Congress fashioned standards of fault on a particularized basis under the securities laws. See Hochfelder, 425 U.S. at 200. "Ascertainment of congressional intent with respect to the standard of liability created by a particular section of the Acts must therefore rest on the language of that section." Id. Here, the sole focus of inquiry is § 10(b) under which Rule 10b-5 was promulgated. Congressional intent for other sections, such as § 17a of the 1933 Act, is thus irrelevant.

the will of Congress as expressed by the statute." (425 U.S. at 212-13). The Draftsmen's Commentary to § 101 of the Uniform Act confirms that Rule 10b-5 was "the logical model" for a uniform state fraud provision because of the language disparities in existing state statutes and "because of the substantial body of judicial precedent which has been developed under the federal provisions." Louis B. Loss, Commentary on the Uniform Securities Act 7 (1976) (emphasis supplied).

This comment also reveals that the draftsmen anticipated that adopting states would construe § 101 in harmony with federal court interpretation of Rule 10b-5. A prominent commentator on Utah law (Professor Wallace Bennett) presumed that federal and state court construction of like provisions would be identical. See Wallace F. Bennett, Securities Regulation in Utah: A Recap of History and the New Uniform Act, 1963 Utah L. Rev. 216, 232 n.112 ("Similarity to the federal statute will allow for interchangeability of judicial precedence in this important area").

Utah's legislature expressed synonymous intent. Aware of the Utah Act's federal origin, Utah's legislature declared that the Act was intended not only to encourage uniformity among the states, but "to coordinate the interpretation and administration of this chapter with the related federal regulation." Utah Code Ann. § 61-1-27 (emphasis supplied). The

Utah Act must be construed to effectuate this "general purpose." Id.

2. Scienter is Required to Violate Rule 10b-5 and § 61-1-1

The SEC promulgated Rule 10b-5, the federal regulation "related" to § 61-1-1, under authority of § 10(b) of the 1934 Act which proscribes "any manipulative or deceptive device or contrivance" in contravention of SEC rules. See Hochfelder, 425 U.S. at 195. Section 10(b) was intended to address "practices that involve some element of scienter . . . ." 425 U.S. at 201. See also Aaron v. SEC, 446 U.S. 680, 713 (1980) (Blackmun concurring and dissenting). Rule 10b-5 requires the same mental state. Hochfelder, 425 U.S. at 212-14. See also Dirks v. SEC, 463 U.S. 646, 663 n.23 (1983) ("[s]cienter--'a mental state embracing intent to deceive, manipulate or defraud,' [citation omitted]--is an independent element of a Rule 10b-5 violation"), citing Hochfelder, 425 U.S. at 193-94 n.12. See also Aaron, 446 U.S. at 695. Plainly, proof of scienter is also required for a criminal violation of section 10(b) and Rule 10b-5 which from their genesis have been used for criminal prosecution (see 15 U.S.C. § 78ff) and later for a judicially-implied private cause of action. See Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730 (1975); Hochfelder, 425 U.S. at 196. This is "the interpretation" of § 61-1-1's "related federal regulation" contemplated by the Utah legislature. See Utah Code Ann. § 61-1-

27; Payable Accounting Corp. v. McKinley, 667 P.2d 15, 17 (Utah 1983) (in construing Utah securities law, the Court relied on federal case law interpreting the similar federal statute).

Thus, while the language of Rule 10b-5 (b) & (c), like Utah's § 61-1-1(2) & (3), viewed in isolation, could be read to apply to any type of material misstatement or omission, intentional or not (the apparent basis of the Utah Court of Appeals' holding), "such a reading cannot be harmonized with the administrative history of the rule." Hochfelder, 425 U.S. at 212. "In the absence of a conflict between reasonably plain meaning and legislative history, the words of the statute must prevail." Aaron, 446 U.S. at 700. The Utah legislature intended that § 61-1-1 and Rule 10b-5 would be similarly construed.

3. Good Faith is a Defense

Hand-in-hand with the scienter element is the consistent notion that good faith is a defense under Utah's § 61-1-1 and Rule 10b-5. Construing Rule 10b-5 and § 10(b) of the 1934 Act, the Hochfelder Court explained that "[t]here is no indication that Congress intended anyone to be made liable for [manipulative, deceptive or illicit] practices unless he acted other than in good faith." 425 U.S. at 206. The scienter requirement functions in part to protect good faith error. Dirks, 463 U.S. at 674-75 n.11 (Blackmun, J. dissenting). See

also State v. Puckett, 6 Kan. App. 2d 688, 634 P.2d 144, 152 (1981), aff'd 230 Kan. 296, 640 P.2d 1198 (1982).

The reasoned decisions of the United States Supreme Court are persuasive here as Utah's legislature intended:

> Where a state statute is patterned after a federal statute, the decisions of the United States Supreme Court and inferior federal courts, interpreting the parent federal statute, are, even though they were handed down after the adoption by the state of the federal statute, most persuasive, particularly where such interpretations are the only ones extant with respect to the disputed words of the state statute.

75 Am. Jur. 2d Statutes § 335 (1974) (emphasis supplied). See also McKinley, 667 P.2d at 17; Reeves v. Gentile, 813 P.2d 111, 115 (Utah 1991) ("[t]he primary rule of statutory interpretation is to give effect to the intent of the legislature in light of the purpose the statute was meant to achieve"); State v. Taylor, 82 Ariz. 289, 312 P.2d 162, 165-66 (1957) (subsequent interpretation of federal statute was entitled to "great weight" in construing state statute); Geraghty v. National Bank of Commerce of Seattle, 8 Wash. 2d 437, 112 P.2d 846, 849 (1941); Utah Code Ann. § 61-1-27.

Other states have correctly applied these principles in construing their version of § 61-1-1. See, e.g., Puckett, 634 P.2d at 154, (citing Hochfelder and acknowledging scienter requirement); People v. Terranova, 38 Colo. App. 476, 563 P.2d 363, 365-66 (Colo. Ct. App. 1977) (acknowledging scienter is an element, the court concluded: "we look to Federal court

interpretation of Rule 10b-5 and the nature of the intent required to sustain a violation of the rule").

Several states, however, have failed to acknowledge (or were perhaps unaware of) the federal origin and meaning of the Uniform Securities Act and its intent to harmonize state and federal regulation. See, e.g., People v. Cook, 89 Mich. App. 72, 279 N.W.2d 579 (1979) (Hochfelder and its progeny not mentioned); People v. Johnson, 213 Cal.App.3d 1369, 262 Cal.Rptr. 366 (1989); People v. Whitlow, 89 Ill.2d 322, 433, N.E.2d 629, 633-34, cert. denied, 459 U.S. 830 (1982); State v. Temby, 108 Wis.2d 521, 322 N.W.2d 522, 525-27 (1982); State v. Fries, 214 Neb. 874, 337 N.W.2d 398, 404-05 (1983); State v. Ross, 104 N.M. 23, 715 P.2d 471, 474 (N.M. App. 1986); State v. Tarzian, 136 Ariz. 238, 665 P.2d 582, 585-86 (Ariz. App. 1983). The government urges these decisions which would permit sweeping, strict-liability prosecutions. The analysis applied in these opinions, however, conflicts with Utah's legislative mandate.

First, of these seven jurisdictions, four appear not to have the specific legislative directive found in Utah to construe these laws in accordance with the related federal regulation. See Ariz. Rev. Stat. Ann. § 44-1800 et seq., Cal. Corp. Code § 25000 et seq., Ill. Rev. Stat. § 121½-137.1 et seq., (language broader than the Uniform Act), N.M. Stat. Ann. § 58-13B-1 et seq. Only Michigan, Wisconsin and Nebraska have statutory provisions

similar to § 61-1-27. Decisions from two of these three jurisdictions make no mention of federal law, apparently unaware of federal precedent and the legislative intent. See State v. Fries, 214 Neb. 874, 337 N.W.2d 398 (1983); People v. Cook, 89 Mich. App. 72 279 N.W.2d 579 (1979). Court analysis in the third jurisdiction, Wisconsin, is equally flawed because it fails to discern the controlling federal rule. In State v. Temby, 108 Wis. 2d 521, 322 N.W.2d 522, 525-27 (1982) the court inexplicably cites Aaron for the proposition that intent to defraud is not an element under "the federal statute dealing with fraudulent securities transactions." 322 N.W.2d at 526 (emphasis supplied). Apparently unaware of the many other federal provisions dealing with fraudulent securities transactions, the Temby court overlooked the Aaron holding that Rule 10b-5, the model for the provision at issue in Temby, and here, requires scienter. Aaron, 446 U.S. at 691.

These cases are deficient in other ways. For example, State v. Ross, 104 N.M. 23, 715 P.2d 471, 474 (Ct. App. 1986), relied in part on pre-Hochfelder federal cases which, to the extent they did not require scienter, were overruled by Hochfelder. 425 U.S. at 212-13. In short, these opinions cannot be reconciled with Utah's legislative intent. See Utah Code Ann. § 61-1-27; McKinley, 667 P.2d at 17.

Yet, like those courts, the Court of Appeals deviates from the federal pattern, focusing solely on the language of § 61-1-21 and on Mr. Larsen's use of the now-outmoded phrase "specific intent" in his description of the scienter element.[6] (Ct. App. Opinion at 13-14). It never considered Utah's legislative mandate, the related federal rule to which Utah courts were intended to look, and never mentioned Hochfelder and its progeny. (Ct. App. Opinion at 13-14). As a result, the holding drives a wedge between Utah law and its federal model, contributing to regulatory discord, contrary to the intent of § 61-1-1. See Utah Code Ann. § 61-1-27.

The Court of Appeals' decision not only offends legislative intent, it spawns grave uncertainty among Utah businesses and investors who now face criminal conviction for a good faith mistake. Such concerns are evidenced by Hochfelder where a national accounting firm was sued for securities fraud violations under section 10(b) and Rule 10b-5. The plaintiff claimed that accountants acted with "inexcusable negligence" by conducting an audit that failed to reveal that the audited company, a brokerage firm, had defrauded investors. Hochfelder, 425 U.S. at 190 n.5. The Hochfelder Court held that the

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[6]Mr. Larsen's requested jury instructions specified that "the specific intent to defraud" had to be shown. (Defendants' Requested Instruction No. 5). Mr. Larsen expressly cited Hochfelder as authority for the intent element. (Defendants' Requested Instruction No. 4). (Ct. App. Opinion at 13-14).

accountants' good faith was a defense and that negligence was insufficient to impose liability. Id. at 213-14. If, however, the Hochfelder accountants were sued in Utah for securities fraud, as the Court of Appeals now defines it, the result would be quiet different; they would have no "intent" defense even if they acted reasonably and in good faith. (Ct. App. Opinion at 13-14).

This example reveals important policy considerations that support the scienter requirement in Hochfelder. Investors require concise, understandable reports to make informed investment decisions. If an accounting firm, for example, were held criminally or civilly liable for its failure to discover and disclose a material fact without proof of scienter, accounting firms would be disinclined to provide reports unqualified in any respect because of the daunting risk associated with their representations or good faith oversight. Additionally, investors may no longer receive relevant information in digestible form as overly cautious professionals and business people deluge investors with insignificant records and "information" to avoid criminal liability for failure to disclose something that could possibly be material. Some responsible individuals and entities might find the risk unacceptable and stop providing investor services altogether.

These effects are avoided by the scienter requirement that better protects investors. The scienter rule sends clear warning to those who would deceive or manipulate the investing public[7], while allowing securities-related businesses to provide useful, appropriate information to investors with a degree of assurance that they author their own future. In contrast, the Court of Appeals' holding exposes persons and entities involved with securities--brokers, accountants, financial advisors and others--to criminal prosecution for good-faith actions taken to assist the investing public. This result conflicts with the purpose of the federal rule with which § 61-1-1 was intended to harmonize.

In short, Section 61-1-1 must not be read in isolation, as the Court of Appeals implies; it must be construed like Rule 10b-5 in harmony with its legislative and administrative genesis, "a history making clear that when the Commission adopted the Rule, it was intended to apply only to activities that involved scienter." Hochfelder, 425 U.S. at 212. The trial court's refusal to instruct the jury concerning this element of the offenses charged under § 61-1-1, as Mr. Larsen requested, is reversible error. State v. Jones, 823 P.2d 1059, 1061 (1992). This failure, which constitutes a violation of due process (see

[7]The strict liability effect of the Court of Appeals holding serves as no deterrent to a good faith mistake which, by its nature, is perceived by the actor as lawful and harmless.

Carella v. California, 491 U.S. 263, 265 (1989); State v. Scott, 110 Wash. 2d 682, 757 P.2d 492, 496 (1988) (en banc)), "can never be harmless error". Jones, 823 P.2d at 1061.

B. "Materiality" Under Securities Law is Not a Proper Subject for Expert Opinion Testimony

1. Introduction

The trial court permitted the State's expert witness, Sherwood Cook, to testify, over objection,[8] whether certain alleged omissions by Mr. Larsen would be "material." Mr. Cook was displayed to the jury as an attorney admitted in both Utah and Nevada, a former Utah securities regulation official and the top securities administrator for Nevada--someone "familiar with both the state and federal requirements of disclosure in limited offerings." (Transcript vol. VI at 39, 42, Appendix E). The State posed hypothetical questions to Mr. Cook consisting of a simplified rendition of the State's version of the case. (Transcript Vol. VI at 45, 76-77, 85-86, 89-91, Appendix E). The trial court allowed Mr. Cook to opine, in essence, that "facts" Mr. Larsen allegedly omitted from securities registration disclosure documents were "material." Mr. Cook, in effect, rendered his expert opinion that Mr. Larsen was guilty.

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[8]Prior to trial, counsel for Mr. Larsen also submitted a motion in limine to preclude opinion testimony from State "securities experts" regarding whether alleged representations or omissions met the legal standard of "materiality" for of a securities prosecution under Utah Code Ann. § 61-1-1(2). The trial court did not rule.

(Transcript at 45, 76-77, 85-86, 89-91, Appendix E).[9] Relying on invalid case authority, the Court of Appeals found the testimony proper because it went to "an ultimate issue of fact." (Ct. App. Opinion at 9-11).[10] This ruling is incorrect.

2. The Court of Appeals Disregarded the Correct Analysis of Federal Securities Actions Involving Expert Opinion and Relied on Vacated Case Authority

Admission of Mr. Cook's testimony was error under the analysis applied in federal securities cases, cases which pose unique problems in defining the scope of proper expert testimony. In the first of the leading decisions, Scop v. United States, 846 F.2d 135 (2d Cir.) modified on rehearing, 856 F.2d 5 (1988), the defendant was convicted of federal securities fraud after the government introduced opinion evidence through an SEC official offered as an expert witness. Taken as a whole, the expert opinions expressed that the defendant's actions constituted "manipulation" and "fraud" which were terms of the statute used to charge the defendant. Scop, 846 F.2d at 138. The Scop court

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[9]Cook even testified, over objection, regarding his supervision of another investigation of Mr. Larsen and others involving a transaction which took place prior to the events giving rise to this case. (Transcript Vol. VI at 47-52, Appendix E).

[10]One member of the panel of the Court of Appeals declined to join in this section of the opinion. (Ct. App. Opinion at 15).

found that the expert's use of statutory terms created an improper legal conclusion:

> Had Whitten [the witness] merely testified that controlled buying and selling of the kind alleged here can create artificial price levels to lure outside investors, no sustainable objection could have been made. Instead Whitten made no attempt to couch the opinion testimony in even conclusory factual statements but drew directly on the language of the statute and accompanying regulations concerning "manipulation" and "fraud." In essence, his opinions were legal conclusions that were highly prejudicial and went well beyond his province as an expert in securities trading.

Id. at 140. Fear that the jury may have been mislead by such testimony was heightened by the fact that statutory terms like "manipulation" and "scheme to defraud" are not self-defining, but have been the subject of diverse judicial interpretation. Id. at 140-41.

The analysis in Scop is understandable and persuasive. Like the expert opinion in Scop, Mr. Cook's testimony improperly drew on language of the statute under which Mr. larsen was charged -- § 61-1-1. (Transcript Vol. VI at 86, 89, 91; Utah Code Ann. § 61-1-1). Mr. Cook's opinions "were calculated to invade the province of the court to determine the applicable law and to instruct the jury as to that law." Id. at 140 citing F.A.A. v. Landy, 705 F.2d 624, 622 (2d Cir.), cert denied, 464 U.S. 895 (1983); (Transcript Vol. VI at 89-91). The Court of Appeals failed to address this, remarking inexplicably that Mr. Cook used the legal, statutory term "material" in a "factual"

way. (Ct. App. Opinion p. 10). Moreover, like the statutory term "manipulation," disapproved for expert use in Scop, "materiality," an element of the offense charged here, is not a self-defining term. Id.

Other securities cases confirm the problems associated with use of "securities expert" testimony regarding legal standards. In Marx & Co., Inc. v. Diner's Club, Inc., 550 F.2d 505 (2d Cir. 1977), cert. denied, 434 U.S. 861 (1977), a "securities expert" testified concerning what he thought the contract phrase "best efforts" meant, and whether or not the defendants there had used "best efforts." Id. at 509. The expert also testified that failure to issue a registration statement within 70 days was proof that "best efforts" were not used. Id. at 510. Finding this testimony an inadmissible legal opinion concerning "reasonableness" of delay in registration, the Marx court noted that securities fraud litigation presents a special danger of abuse of expert witness testimony: "With the growth of intricate securities litigation . . . we must be especially careful not to allow trials before juries to become battles of paid advocates posing as experts on the respective sides concerning matters of domestic law." Id. at 511.

Adalman v. Baker, Watts & Co., 807 F.2d 359 (4th Cir. 1986) is another example. There, the defendants attempted to call as an expert witness an attorney who was former counsel for

the defendants. The attorney was to testify concerning whether certain omitted information was "material" to an investment decision. The court held such testimony inadmissable because the expert would in effect "testify in substantial part to the meaning and applicability of the securities laws to the transactions [at issue], giving his expert opinion on the governing law." Id. at 368.

These cases reveal that while Mr. Cook's opinions were not improper just because they went to an "ultimate issue," they were improper because they are not "otherwise admissible" (Rule 704, Utah R. Evid.); they "were legal conclusions that were highly prejudicial and went well beyond his province as an expert in securities trading." Scop, 846 F.2d at 140.[11] Like the testimony in Marx and Adalman, the objectionable portions of Cook's testimony "did not concern practices in the securities business on which [he] was qualified as an expert, but were

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[11] Both Marx and Adalman implicitly recognize the risk that experts in areas of law have their own ideas not only as to what the law requires, but what they think it should require. Often, as here, this line is blurred in the mind of the witness, let alone the juror's minds. These cases also recognize that testimony of legal experts in securities fraud cases presents significant conceptual problems which reach beyond securities issues. See, e.g., Adalman v. Baker, Watts & Co., 807 F.2d 359, 366 (4th Cir. 1986) ("If such experts are to testify to the meaning and applicability of securities laws, what line is to be drawn to exclude tort lawyers from offering their expert opinions to the jury as to the meaning and applicability of laws governing tort litigation. Examples of this sort could be multiplied across the gamut of litigation").

rather legal opinions as to the meaning of the . . . terms at issue." Marx at 509.

The Court of Appeals disregarded this authority and relied instead on language from United States v. Leuben, 812 F.2d 179 (5th Cir. 1987), which, apparently unknown to the Court of Appeals, was previously vacated. See United States v. Leuben, 816 F.2d 1032, 1033 (5th Cir. 1987).[12] Leuben, which involved neither securities claims nor actual testimony, consists of two reported decisions; the first, (the only one the Court of Appeals cites) noted that the parties had simply assumed that the issue of materiality under 18 U.S.C. § 1001 was a question of law, while under 18 U.S.C. § 1014 it was an issue of fact. 812 F.2d at 183. Relying on that assumption, the Leuben court held that expert testimony on a "factual" issue of materiality was permissible. Id. It also held that under FRE 403, the trial court abused its discretion by permitting the government to put on expert testimony on "materiality" while prohibiting similar testimony by the defense. Id. at 184.

The second Leuben decision (overlooked by the Court of Appeals), vacated its prior assumption that "materiality" was a fact question and held that the issue correctly was one of law.

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[12]Stating that it was "persuaded by Leuben", the Court of Appeals characterized the case as follows: "In Leuben, the Fifth Circuit held that expert opinion on materiality was admissible as being fact-oriented." (Ct. App. Opinion at 10).

Leuben, 816 F.2d 1032, 1033 (5th Cir. 1987). Given this subsequent correction, Leuben plainly does not stand for the proposition attributed to it by the Court of Appeals. (Ct. App. Opinion at 10).

More importantly, even if the analysis of the first Leuben decision were valid, it would exclude Mr. Cook's testimony. The Leuben court characterized the proffered testimony as "fact-oriented" because it would have been phrased in terms of whether certain false statements would "'have the capacity to influence' a loan officer, not the legal question of whether the statements were 'material.'" Leuben, 812 F.2d at 184. Here, while the State's questions may have been permissible, though very close to the line, Mr. Cook's responses entered forbidden ground when he characterized information as "material." (Transcript Vol. VI at 76-77, 86-87, 89, 91). Thus, even under Leuben, Cook's response, and the entire line of questioning viewed as a whole, fell within the range of evidence distinguished in Leuben as impermissible. Id.

3. The Court of Appeals Misapplied Rule 704

Rule 704 Utah R. Evid., modeled on the federal rule, abolished the prohibition on opinion testimony going to an "ultimate issue of fact." Relying on Leuben, the Court of Appeals apparently read Rule 704 to mean that opinion testimony is admissible if it goes to an issue of ultimate fact because, by

definition, it is not a legal conclusion. (Larsen, 828 P.2d at 493). This incorrect approach stands Rule 704 on its head.

Under Rule 704, evidence does not become admissible because it goes to an ultimate fact; rather it cannot be excluded only because it goes to an issue of ultimate fact.[13] Testimony going to an ultimate fact issue may be inadmissible for other reasons; e.g., where, as here, that testimony embodies a legal conclusion. Scop, 846 F.2d at 139-40.

The intent of Rule 704 is to eliminate the labelling problem created by the ultimate fact rule. (See Rule 704, Utah R. Evid. Advisory Committee Notes and Rule 704 Fed. R. Evid. Advisory Committee Notes). Yet the Court of Appeals' approach replaces one label with another. To say an issue is one of ultimate fact and not a legal opinion simply states the result and fails to clarify the basis for this determination. "Materiality" in the context of a securities claim cannot be neatly labelled as a legal or a fact issue; it is a conclusion reached by applying an objective legal standard to a set of facts. Here, the analysis must focus on whether the expert improperly supplants the judge as law giver and as the jury

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[13] "The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. . . . [Rule 403, 701 and 702] afford ample assurances against opinions which would merely tell the jury what result to reach." Marx, 550 F.2d at 511 n.17, citing Notes of Advisory Committee on Proposed Rule 704, Fed. R. Evid.

instructor and on whether the opinions are "phrased in terms of inadequately explored legal criteria." Scop, 846 F.2d at 140.

Mr. Cook's testimony is not troublesome because he gave evidence of a factual predicate for materiality. The error occurred when he was permitted in effect to instruct the jury that in his opinion Mr. Larsen failed to disclose material facts; in essence, that Mr. Larsen was guilty. (Transcript Vol. VI pp. 86, 89, 91).[14] This is not proper, as the court explained in

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[14]This was worsened by portions of Cook's testimony that were incomplete and misleading. At one point, Mr. Cook opined as follows:

> Q: And if there is a change that the seller realizes later on after he has used the document disclosing the investment manager will function, what is the proper way of dealing with that?
>
> Mr. Keller: Objection, 702.
>
> Court: Overruled.
>
> A: Investor should be informed of that change and given a chance to get out of the investment.

(Transcript Vol. VI at 91-92). This question in effect asks Mr. Cook if, in his opinion, an offeror has a legal duty to correct or update offering materials. It is unclear whether the question is limited to the offering period or whether the obligation is absolute and continuing. While no Utah authority appears on this issue, under federal securities law the duty to update or correct is highly fact and time sensitive. See, e.g., Ross v. A.H. Robbins Co., Inc., 465 F. Supp. 904 (S.D.N.Y. 1979), rev'd on other grounds 607 F. 2d 545 (2d Cir. 1979), cert. denied 446 U.S. 946 (1980). Mr. Cook stated a broad legal standard without qualification. This kind of testimony not only constitutes a legal conclusion, but because its correctness depends on facts not presented by the evidence or even hypothetically, it should have been excluded as an opinion "phrased in terms of inadequately explored legal criteria." Scop, 846 F.2d at 140.

Matthews v. Ashland Chemical, Inc., 770 F.2d 1303 (5th Cir. 1985). There, the trial court excluded proffered expert testimony based on broad hypothetical questions that assumed every relevant fact and that required the expert to give legal opinions on the complex personal injury case, including proximate cause. Id. at 1311. The court affirmed, noting that the defendant was "asking his expert to tell the jury what result to reach after having been told all of the facts possibly relevant to the case." Id. at 1311. This case is no different. By admitting Cook's testimony, the trial court allowed the State's expert to instruct the jury on its result after rehearsing the facts of the State's case. (Transcript Vol. VI at 76-77, 86-87, 89-91).

This error is compounded by Mr. Cook's status as an attorney and securities regulator. The forceful impact of his ostensibly vast, specialized knowledge as an attorney in the securities area prevented subsequent correction of his improper testimony. This was explained in Specht v. Jensen, 853 F.2d 805 (10th Cir. 1988). In Specht, a 1983 Civil Rights action for unlawful search, an attorney expert-witness for the plaintiff considered "hypothetical" circumstances which, according to the court, merely restated the plaintiffs' view of the evidence. Id. at 807. The attorney witness testified that as a constitutional expert, he believed no consent had been given and that the search

violated constitutional rights. Id. at 809. The Court of Appeals reversed, finding that the witness supplanted both the trial court and jury with the "array of legal conclusions." Id. The error was not harmless:

> [g]iven the pervasive nature of this testimony, we cannot conclude its admission was harmless. There is a significant difference between an attorney who states his belief of what law should govern the case and any other expert witness.

Id. at 808.

Like the attorney witness in Specht, Mr. Cook, an attorney and securities regulator, "imbued with all the mystique inherent in the title 'expert,'" heightened the "substantial danger" that "the jury simply adopted the expert's conclusions rather than making its own decision." Id. at 809. The error of admitting his testimony could not be corrected by cross-examination, rebuttal, or instruction as the Court of Appeals suggests. Id. See also United States v. Zipkin, 729 F.2d 384 (6th Cir. 1984) (testimony by bankruptcy judge concerning his prior order and availability of interim fees not curable by cross-examination); Marx & Co., Inc. v. Diners' Club, Inc., 550 F.2d 505, 511 (2d Cir. 1977) ("[C]ompelling the opponent to cross-examine to repair the damage is to invite disaster"); (Ct. App. Opinion at 11). Admitting the testimony of the State's attorney expert, Sherwood Cook, was improper and highly prejudicial.

CONCLUSION

For the above reasons, the Court should reverse the decisions of the Court of Appeals and trial court and remand for new trial.

DATED this 14th day of October, 1992.

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By _____
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing BRIEF OF PETITIONER to be hand delivered this 14 day of October, 1992, to the following:

R. PAUL VAN DAM
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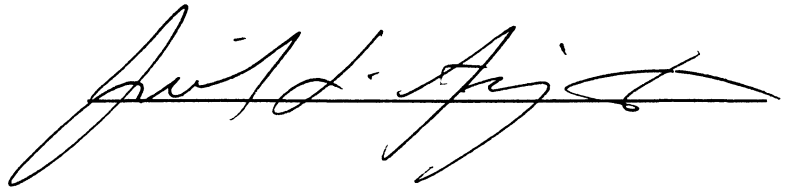

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APPENDIX

Tab A

FEB 10 1992

COVER SHEET

CASE TITLE:

State of Utah,
Plaintiff and Appellee,
v. Case No. 900473-CA
C. Dean Larsen,
Defendant and Appellant.

February 7, 1992. OPINION (For Publication).

Opinion of the Court by RUSSELL W. BENCH, Judge; NORMAN H. JACKSON, Judge, concurs. GREGORY K. ORME, Judges, concurs in parts and otherwise concurs in result only.

CERTIFICATE OF MAILING

I hereby certify that on the 7th day of February, 1992, a true and correct copy of the foregoing OPINION was deposited in the United States mail to each of the parties listed below:

Larry R. Keller (Argued)
Attorney at Law for Appellant
257 Towers, Suite 340
257 East 200 South - 10
Salt Lake City, UT 84111

and a true and correct copy of the foregoing OPINION was hand-delivered to a personal representative of the Attorney General's Office, to be delivered to the each of the parties listed below:

R. Paul Van Dam
State Attorney General
David B. Thompson (Argued)
Assistant Attorney General
236 State Capitol
Salt Lake City, UT 84114

and a true and correct copy of the foregoing OPINION was hand-delivered to the trial judge of record listed below:

The Honorable Leonard H. Russon
Utah Court of Appeals Judge
230 South 500 East, Suite 400
Salt Lake City, UT 84102

Deputy Clerk

TRIAL COURT:

IN THE UTAH COURT OF APPEALS

----ooOoo----

State of Utah, Plaintiff and Appellee,	)	OPINION (For Publication)
v.	)	Case No. 900473-CA
C. Dean Larsen, Defendant and Appellant.	)	F I L E D (February 7, 1992)

Third District, Salt Lake County
The Honorable Leonard H. Russon

Attorneys: Larry R. Keller, Salt Lake City, for Appellant
R. Paul Van Dam and David B. Thompson, Salt Lake City, for Appellee

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Before Judges Bench, Jackson, and Orme.

BENCH, Presiding Judge:

C. Dean Larsen appeals his conviction of eighteen counts of securities fraud and theft on the ground that the Office of the Utah Attorney General (the Attorney General) should have been disqualified from the case for a conflict of interest. Larsen further asserts that formal investigation into wrongdoing was prompted by disclosure of confidential information from his attorney, and constituted an ethical violation. Larsen also challenges the admissibility of opinion testimony by the State's expert, the court's failure to prohibit certain evidence, and its refusal to give certain jury instructions. We affirm.

I. FACTS

In the early 1970s, C. Dean Larsen, an attorney with a background in real estate that predated his law career, filed articles of incorporation for what became a real estate development company known as Granada, Inc. (Granada). Larsen served as president of Granada, a closely held corporation owned by him and members of his family. According to Larsen, Granada was "inactive" during the first few years after incorporation,

development. The projects ranged from housing developments and apartments, to office buildings and a shopping center. The projects were mostly concentrated along Utah's Wasatch Front at first, but eventually they included real estate developments in Arizona and Nevada. The first fifteen or twenty projects were also very successful.

In simple terms, the capital for most of the projects was provided by Larsen's law clients, typically doctors and dentists for whom he had set up professional corporations and pension plans. These clients invested retirement and pension monies in various limited partnerships Larsen formed for real estate development. Granada served as general partner in many of the limited partnerships, and acted as manager in others when a different general partner was named. In all, close to one hundred real estate limited partnerships were organized.[1]

Granada had no employees during the first eight years after its incorporation, but hired its first employee in 1979. More employees were hired as Granada grew. Larsen said that, with this growth, he spent more of his time with Granada, and less time with his law practice. Larsen thereupon hired Brian Farr, a recently licensed attorney.

Larsen claims he hired Farr as his own personal attorney to advise him in representing his clients, thereby creating an attorney-client relationship nested within another attorney-client relationship. Although Larsen disputes that Farr was ever an associate, except briefly, he referred several legal matters to Farr to be performed on behalf of his clients. Larsen also assigned Farr some legal work of a personal nature, such as a parking violation by an office vehicle, pro bono litigation, a land sale, and preparing amendments to an unrelated family partnership as new family members were born. Larsen further assigned Farr some Granada-related projects, such as evictions and a health plan.

Larsen supervised Farr's work throughout their working "relationship." Farr reported the hours he worked to Larsen, who then billed the clients. In turn, the clients paid Larsen, and Larsen paid Farr for his services through an account in the name of Larsen's professional corporation. The Larsen-Farr relationship lasted approximately four years.

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1. Of these entities, only the limited partnerships known as The Oaks, Ltd., Three Crowns, Baseline, and EFF Fund, Ltd., were involved in the forty-two count amended information.

Larsen and Farr sometimes conferred together with clients. According to Farr, during one such meeting, after setting up a professional corporation and a pension plan for a doctor and his wife, Larsen explained about certain reporting requirements that were involved. Larsen informed the clients that an accountant, a bank or a specialized pension accounting service could discharge those duties. Farr asserted that Larsen discouraged the clients from using a bank or an accountant, but recommended that they use Professional Pension Services (PPS), an entity that Larsen said dealt exclusively with pension matters. Larsen also told the clients that if they were to use PPS, they would like its liquid mortgage fund because investments in the fund required no minimum deposit and carried no penalty for early withdrawal. It appears from the record that PPS was loaning the fund proceeds to Granada-related projects.

Farr claimed that Larsen failed, in recommending PPS, to disclose his former ownership of or continuing influence over PPS. Farr believed these omissions could put the clients' investments at risk. After the meeting, Farr contacted PPS at the request of the clients for information about the liquid mortgage fund. He learned that PPS did not have an offering statement or any agreement regarding the use of the liquid mortgage fund. Farr's concerns were further heightened when he was unable to find any recorded trust deeds securing the loans. After reviewing files at Granada and receiving additional information from PPS, Farr discovered that these problems were widespread.

Farr spoke to Larsen about what he had learned and perceived to be a problem. Larsen assured him that the matter would be resolved. Despite these assurances, nothing was done. Farr continued to press Larsen for a resolution and even volunteered to handle the matter. Larsen rejected the offer, and hired outside counsel to research any possible violations of state securities laws. As a result of the growing tension between Larsen and Farr, their work relationship was severed in 1982.[2]

Following the breakup, Farr continued to be concerned about the interests of former "clients," especially their investments in Granada. As a result of what he perceived to be ongoing securities violations, Farr contacted Constance White of the Utah Securities Division (Securities Division) in 1983. Farr told

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2. Larsen claims that Farr's failure to make partner was the reason for the breakup as well as his motive in reporting Larsen to the Utah Securities Division, a rather telling statement in view of Larsen's claim that Farr was never even an associate in any meaningful sense.

White what he knew about Granada based on what he had seen, was told, or had heard. White then turned the matter over to the Securities Division staff for investigation. Later, in 1986, Farr was employed by the Attorney General in the Health Division.

Concurrent with these events, Granada began to experience serious cash flow shortages and its investments suffered. Larsen claimed he believed Granada was solvent, and sought Securities Division approval for a new mortgage fund offering by Granada. In early 1987, Larsen learned that the figures he relied on were inaccurate. The Securities Division told Larsen that Granada would be placed in receivership if Granada did not petition for bankruptcy. Granada then petitioned fo[redacted]ruptcy in February 1987.

On October 19, 1988, the State filed a fifty-count criminal complaint against Larsen. The complaint alleged that Larsen had committed securities fraud and related acts of dishonesty in the sale of securities. Larsen was bound over on forty-two counts following a motion to amend and a lengthy preliminary hearing. Larsen then moved to sever the trial into five parts in order to more closely align the victims, dates, transactions, and entities involved. The trial court granted the motion and Larsen went to trial on the eighteen counts of securities fraud involving EFF Fund, Ltd. (EFF Fund or EFF).

Larsen then moved to disqualify the Attorney General on the ground that Farr's subsequent employment with the State, when coupled with his previous disclosures to the Securities Division, posed a conflict of interest that should have been imputed to the entire office of the Attorney General. After a two-day hearing in which Farr, Larsen, and White testified, the district court denied the motion.

Larsen filed a written opposition to the ruling, and filed an interlocutory appeal, both of which were denied. Before trial, Larsen moved to prohibit testimony about any entities other than EFF Fund, but the motion was denied. Larsen also moved to prohibit inquiry into the investigation by the Securities Division that led to the eventual suspension of EFF. That motion was deferred until trial. After a two-week trial, a jury found Larsen guilty of all eighteen counts.

II. DISQUALIFICATION

A. Attorney-Client Relationship

Larsen argues that the Attorney General should have been disqualified from prosecuting the case against him because Farr's employment with the Health Division mandated disqualification under the imputed conflict of interest rule. See Utah Rules of Professional Conduct Rule 1.10 (1990). Larsen also contends that his conviction should be reversed because Farr's disclosures to the Securities Division violated certain ethical duties of confidentiality owed to Larsen as a former client of Farr. The threshold issue of both these arguments is whether an attorney-client relationship existed. Cf. Williams v. Barber, 765 P.2d 887, 889 (Utah 1988)(threshold inquiry in legal malpractice is whether an attorney-client relationship existed). The trial court found that Farr was not Larsen's attorney except for a few minor transactional matters unrelated to securities or the criminal charges against him in this case, and denied Larsen's motion to disqualify.

To prove that the trial court's findings of fact were clearly erroneous, "an appellant must marshal all evidence in favor of the facts as found by the trial court and then demonstrate that even viewing the evidence in a light most favorable to the court below, the evidence is insufficient to support the findings of fact." Saunders v. Sharp, 806 P.2d 198, 199-200 (Utah 1990). If an appellant fails to marshal the evidence, "the appellate court assumes that the record supports the findings of the trial court and proceeds to a review of the accuracy of the lower court's conclusions of law and the application of that law in the case." Id. at 199.

Larsen challenges several factual findings of the trial court concerning the nature or extent of their professional relationship,[3] but admits he "may have fallen somewhat short" in

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3. Larsen challenges the following factual findings on appeal: (1) that Farr was an associate of Larsen in the practice of law; (2) that Farr occasionally performed legal work for Larsen personally; (3) that the legal work involved minor transactions unrelated to the matters or issues pending in this prosecution; (4) that Farr did not represent Larsen while serving common clients; (5) that, if an attorney client relationship existed between Farr and Larsen, it was related only to minor transactional matters, and not to any matter substantially related to the prosecution; (6) that Farr was not general counsel for Granada; (7) that Farr performed legal work for Granada in a

(continued..)

marshaling the evidence. Larsen even goes so far as to suggest that he was prevented from doing so because of page limitations imposed upon him.[4] Our insistence on compliance with the marshaling requirement is not a case of exalting hypertechnical adherence to form over substance. "A reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research." State v. Bishop, 753 P.2d 439, 450 (Utah 1988)(quoting Williamson v. Opsahl, 92 Ill. App. 3d 1087, 1089, 416 N.E.2d 783, 784 (1981)). The marshaling requirement provides the appellate court the basis from which to conduct a meaningful review of facts challenged on appeal. See Wright v. Westside Nursery, 787 P.2d 508, 512 n.2 (Utah App. 1990)(the purpose of the marshaling requirement is to spare appellate courts the onerous burden of combing through the record in search of supporting factual matters).

Larsen argued only "selected evidence favorable to [his] position," Crookston v. Fire Ins. Exch., 817 P.2d 789, 800 (Utah 1991), without presenting any of the evidence supporting the trial court's findings. Larsen's approach "does not begin to meet the marshaling burden [he] must carry." Id. Because Larsen failed to marshal evidence in support of the trial court's findings and show how they are clearly erroneous, we affirm the factual findings of the trial court that Farr was not Larsen's personal attorney, except in a few minor transactional matters unrelated to this prosecution.[5]

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3. (...continued)
few minor matters; (8) that the work was unrelated to the matters and issues pending in this prosecution; and (9) that Farr's representation ceased prior to 1983.

4. Larsen was allowed to file an overlength brief of 81 pages after his request to file a 120-page brief was denied. The 81-page brief was supplemented by five volumes of supporting addenda that made extensive reference to memoranda of points and authorities in the briefs filed below, thereby, circumventing any size restrictions. Given this leeway, the argument that Larsen was prevented from marshaling is somewhat disingenuous.

5. Larsen asserts that it was his subjective belief that Farr was his personal attorney in all things, but fails to present any evidence of conduct that would warrant an implied attorney-client relationship. See, e.g., Margulies v. Upchurch, 696 P.2d 1195, 1200 (Utah 1985)(an attorney-client relationship was implied where the law firm had represented a limited partnership in which the would-be clients had invested); Breuer-Harrison, Inc. v.

(continued...)

B. Substantial Factual Relationship Test

Having affirmed the trial court's finding regarding the limited nature of the attorney-client relationship between Farr and Larsen, we review its decision to not disqualify the Attorney General. The parties agree that the applicable standard governing disqualification is set forth in Rule 1.10(b) of the Utah Rules of Professional Conduct, which provides as follows (with our emphasis):

> When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially factually related matter in which that lawyer, or firm with which the lawyer has associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter.

Whether the matters in which Farr represented Larsen were "the same or substantially factually related" to the current case is a critical factor in the disqualification calculus. The trial court found that Farr's representation of Larsen was limited to a handful of legal matters unrelated to the securities or criminal charges against him.

On appeal, Larsen offered no argument that the matters in which the trial court found Farr had represented him were the same or substantially related to the matters for which disqualification is now sought. Unless a substantial factual relationship is shown between the matters, disqualification is not required under the rule because the most basic element is not present. Our conclusion that there is no substantial relationship is supported by the fact that Farr learned of the perceived securities problems outside the scope of the legal representation of Larsen expressly undertaken. When Farr

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5. (...continued)
Combe, 799 P.2d 716, 727-28 (Utah App. 1990)(although an attorney-client relationship may be implied by the parties' conduct, a would-be client's belief that a professional relationship exists must have been reasonably induced by the attorney's conduct). Cf. Atkinson v. IHC Hosps., Inc., 798 P.2d 733, 735 (Utah 1990)(courts consider who the attorney claimed to have represented as shown by the pleadings and other documents; the existence of an employment contract or retainer agreement; and the parties' admissions about the relationship).

confronted Larsen about the problems, Larsen rejected Farr's offer to handle the matter and hired outside counsel.

Absent a substantial factual relationship between the former and present matters, no attorney-client relationship can be imposed on Farr with respect to this litigation, and "there could be no conflict of interest created" by Farr's subsequent employment with the Attorney General. Marqulies v. Upchurch, 696 P.2d 1195, 1200 (Utah 1985). Accordingly, we conclude that, inasmuch as disqualification of the Attorney General was not mandated under Rule 1.10(b) of the Utah Rules of Professional Conduct, it was not an abuse of discretion for the trial court to allow the Attorney General to remain as counsel. Id.

Further, we also reject Larsen's argument that the mere appearance of impropriety is sufficient to overturn his conviction. In State v. Ford, 793 P.2d 397 (Utah App. 1990), this court said that a criminal defendant "is not automatically entitled to a reversal of his conviction" merely because of an apparent violation of a rule of professional conduct. Id. at 400. If Farr violated any ethical rules, the "appropriate remedy lies with the disciplinary arm of the Utah State Bar." Id.

III. EXPERT OPINION

Larsen argues that the court erred in allowing the former registration chief of the Securities Division, an attorney now serving as a securities examiner in Nevada, to offer expert opinion testimony concerning the "materiality" of information not disclosed to investors. Larsen asserts that the opinion was improper legal testimony, not factual testimony. Whether or not the information was "material" is an element of securities fraud.[6]

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6. It is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly to:

(1) employ any device, scheme, or artifice to defraud;

(2) make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or

(continued...)

It is within the discretion of the trial court to determine the suitability of expert testimony in a particular case, State v. Clayton, 646 P.2d 723, 726 (Utah 1982), and we will not reverse that determination on appeal in the "absence of a clear showing of abuse." Lamb v. Bangart, 525 P.2d 602, 607-08 (Utah 1974). Expert testimony is suitable if it will "assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." Utah R. Evid. 702. In general, expert testimony is suitable in securities fraud cases because the technical nature of securities is not within the knowledge of the average layman or a subject within common experience and would help the jury understand the issues before them. See Dixon v. Stewart, 658 P.2d 591, 597 (Utah 1982).

Under Rule 704 of the Utah Rules of Evidence, expert opinion is "not objectionable because it embraces an ultimate issue to be decided by the trier of fact".[7] Despite the appropriateness of expert testimony on an ultimate issue, Rule 704 was not intended to allow experts to give legal conclusions. See Davidson v. Prince, 813 P.2d 1225, 1231 (Utah App. 1991)(citing Owen v. Kerr-McGee Corp., 698 F.2d 236, 240 (5th Cir. 1983)).

The danger of allowing expert opinion couched as a legal standard is that "the jurors will turn to the expert, rather than to the judge, for guidance on the applicable law." 3 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence, ¶ 704[02]. See also First Sec. Bank v. Banberry Crossing, 780 P.2d 1253, 1258 (Utah 1989)(legal duty owed by trust deed trustee to trustor is question of law to be determined by the court, and not question of fact suitable for testimony by expert in real estate law); Ashton v. Ashton, 733 P.2d 147, 153 (Utah 1987)(attorney's expert opinion as to effect of joint tenant's conveyance was inadmissible statement of law). The determination of whether expert opinion embraces an ultimate factual issue or constitutes a legal conclusion is a difficult call because "[t]here is no bright line between permissible questions under Rule 704 and

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6. (...continued)

> (3) engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

Utah Code Ann. § 61-1-1 (1989):

7. Black's Law Dictionary 1057 (6th ed. 1991) defines an ultimate issue as "[t]hat question which must finally be answered as, for example, the defendant's negligence is the ultimate issue in a personal injury action."

those that call for overbroad legal responses." Davidson, 813 P.2d at 1231.[8]

The distinction between a factual evidentiary showing of materiality and impermissible opinion on the legal question of materiality was underscored in United States v. Lueben, 812 F.2d 179, 183 (5th Cir. 1987). In Lueben, the Fifth Circuit held that expert opinion on materiality was admissible as being fact-oriented. The court reasoned that whether certain false statements would have had "the capacity to influence" a loan officer as a factual element of the government's case was distinguishable from the question of whether the statements were legally "material." Id. at 184. The government was required to make an initial factual showing of materiality as an element of its case. The Fifth Circuit ruled that the district court, therefore, committed reversible error in not allowing expert testimony since the defendant would have been entitled to a directed verdict of acquittal if the government was unable to prove each element of its case. Id. at 185.

Although Lueben involved a prosecution for making false statements in connection with a loan application and tax returns, rather than securities violations, the case illustrates the distinction between permissible fact-oriented questions as to materiality and impermissible legal conclusions referred to in the cases cited by Larsen.[9] Accordingly, we are persuaded by Lueben that use of the term "material" may be admitted as permissible fact-oriented testimony. Upon review of the record, we conclude that the expert in this case used the term "material" in a factual sense.

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8. See State v. Span, 170 Utah Adv. Rep. 16, 17-18, 26 n.1 (Utah 1991)(arson investigator testified that fire was intentionally set); American Concept Ins. Co. v. Lochhead, 751 P.2d 271, 273 (Utah App. 1988)(expert could submit affidavit as to ultimate issues of lack of good faith and fair dealing in suit for tortious interference with business relations). See also Davis v. Mason County, 927 F.2d 1473, 1484-85 (9th Cir. 1991)(police expert could testify that county sheriff was "reckless" in failing to adequately train his deputies, and that there was a causal link between this recklessness and plaintiffs's injuries); United States v. Nixon, 918 F.2d 895, 905 (11th Cir. 1990)(police detective could use the term "conspiracy," since testimony was factual and not a legal conclusion).

9. See United States v. Scop, 846 F.2d 135 (2nd Cir. 1988); Adalman v. Baker, Watts & Co., 807 F.2d 359 (4th Cir. 1986); and Marx & Co., Inc. v. Diner's Club, Inc., 550 F.2d 505 (2nd Cir. 1977).

Since the State is required to prove all essential elements of a crime, and materiality is an element of the offense charged in this case, there was no abuse of discretion in allowing the expert testimony. See State v. Florez, 777 P.2d 452, 456 (Utah 1989)(state has a right to introduce evidence on every element). Furthermore, any confusion that might have been created by the casual use of the term "material" and its legal definition could have been corrected with a jury instruction. See Conger v. Tel Tech, Inc., 798 P.2d 279, 283 (Utah App. 1990); State v. Ortiz, 782 P.2d 959, 962 (Utah App. 1989).

IV. MOTIONS IN LIMINE

A. EFF Fund

Larsen brought a motion in limine to prohibit the State from introducing testimony concerning any entities other than EFF Fund on the ground that any such evidence was irrelevant to the eighteen counts of securities fraud severed for trial.[10] The State asserted that the evidence was relevant because: EFF had been set up similarly to the other entities; Larsen had told investors that EFF would be operated the same way as PPS; the claim as to similarity was an inducement for investment; and the partnerships all received money from EFF because of their structural similarity.

The State also claimed that Larsen had promised the investors that the loans were secured by promissory notes, but that these documents were only partially completed or non-existent. Although the trial court instructed the State that it could not delve into specific acts of misconduct, the court denied Larsen's motion, stating that the government was entitled to pursue its theory of the case. On appeal, Larsen claims his conviction should be reversed because of prejudicial error inasmuch as the evidence was irrelevant and immaterial.

"Relevant evidence" is defined as that "evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable" and is admissible unless excluded. Utah R. Evid. 401

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10. In particular, Larsen objected to the State's inquiries into how Granada raised money to acquire and develop properties; how the liquid mortgage fund or its counterpart, the PPS fund, operated; how EFF money was used; what limitations were imposed on the fund; whether EFF was ever investigated; the significance of certain portions of a registration statement; and which properties received monies from EFF.

and 402. See generally State v. Gray, 717 P.2d 1313, 1316 (Utah 1986). Rule 403 states that "relevant evidence may be excluded if its probative value is found to be substantially outweighed by the potential for unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Utah R. Evid. 403 (emphasis added). Thus, in determining whether relevant evidence should be excluded, "[e]vidence that tends to prove an element of the crime is admissible. Evidence which goes to general disposition or that is unfairly prejudicial is not admissible." State v. Jamison, 767 P.2d 134, 137 (Utah App. 1989).

The explanations given by the State regarding the relevance of the other entities to EFF were cogent to the legal test of relevance because they tended to make the existence of facts concerning the alleged securities violations more or less probable than without the evidence. The trial court had a legal basis, therefore, to admit the evidence. See State v. Ramirez, 159 Utah Adv. Rep. 7, 16 n.3 (1990).

Larsen does not challenge the merits of any of the reasons given by the State as to relevance. Larsen's claim as to relevance is based solely on the grounds that the EFF Fund, the liquid mortgage fund, and the other partnerships were separate entities. Larsen mistakenly asserts that the trial court's severance of those claims bars any discussion of those entities. The relevance of these other entities to the other charges, as the trial court pointed out, does not preclude their relevance to the EFF Fund.

Larsen also made no argument on how evidence of the other entities confused the issues or misled the jury. The trial court's cautionary instruction prohibiting the State from delving into other acts of misconduct adequately balanced the apparent concerns for unfair prejudice. The trial court, therefore, did not abuse its discretion in admitting the evidence.

B. Investigation by the Securities Division

Larsen also brought a motion in limine to prevent testimony regarding an investigation of Granada by the Securities Division, claiming that the evidence would be "highly prejudicial." Without holding a hearing or ruling on the motion, the trial court indicated in a minute entry that consideration of the matter would be deferred until trial. The testimony was later admitted at trial over Larsen's objection. On appeal, Larsen contends the testimony should have been excluded as impermissible character evidence under Rule 404 of the Utah Rules of Evidence.

> "[I]n order to preserve a contention of error in the admission of evidence for appeal, a defendant must raise a timely objection to the trial court in clear and specific terms. Where there [is] no clear or specific objection on the basis of character evidence or unfair prejudice and the specific ground for objection [is] not clear from the context of the question or the testimony, the theory cannot be raised on appeal."

State v. Schreuder, 726 P.2d 1215, 1222 (Utah 1986)(footnote omitted).

Although Larsen claims he objected "at every opportunity at trial," no Rule 404 character evidence objections were made. Larsen objected to the State asking questions in improper form, assuming facts not in evidence, asking for irrelevant and immaterial evidence, and asking for evidence which, although relevant, should have been excluded under Rule 403.

Larsen's objections as to form, relevance, materiality, leading nature and so on do not call the court's attention to impermissible character evidence and the theory is not clear from the context. See State v. Eldredge, 773 P.2d 29, 35 (Utah), cert. denied, ___ U.S. ___, 110 S. Ct. 62 (1989); Schreuder, 726 P.2d at 1222. Because no proper objection was made, Larsen has not preserved the issue for appeal and we do not address the issue further.

V. REMAINING ISSUES

A. Specific Intent

Larsen argues that the trial court's refusal to give his proposed jury instructions on specific intent was reversible error. Although a criminal defendant is entitled to have the jury instructed on his theory of the crime if there is any basis in the evidence to support that theory, jury instructions should not incorrectly or misleadingly state the law. State v. Aly, 782 P.2d 549, 550 (Utah App. 1989)).

The common law terms "general intent" and "specific intent" have not been used in the Utah criminal code since substantive amendments in 1973. See State v. Calamity, 735 P.2d 39, 43 (Utah 1987). See also Utah Code Ann. § 76-2-102 (1990).

The Utah Code specifies willfulness as the culpable mental state for securities fraud. "Any person who willfully violates

any provision of this chapter . . . or willfully violates any rules or order under this chapter . . . shall upon conviction be fined not more than $10,000 or imprisoned not more than three years, or both." Utah Code Ann. § 61-1-21 (1990)(emphasis added). The trial court, therefore, properly instructed the jury that the culpable mental state for the crime of securities fraud is "willfulness," rather than specific intent as proposed by Larsen. The court defined willfulness as follows:

> You are instructed that a person engages in conduct intentionally or with intent or willfully, with respect to the nature of his conduct or to the result of his conduct, when it is his conscious desire to engage in the conduct or cause the result.

The instruction on willfulness mirrors the statutory definition of willfulness under Utah Code Ann. § 76-2-103(1) (1990). Moreover, because "willfully" is alternatively listed with "intentionally" or "with intent," the instruction is not inconsistent with State v. Facer, 552 P.2d 110, 111 (Utah 1976) (crime of securities fraud does not require element of loss and causal connection, since the crime is complete under section 61-1-1(1) if defendant intentionally employs any device, scheme or artifice to defraud). Inasmuch as willfulness is the culpable mental state, a separate instruction on specific intent was unnecessary.

B. Other Jury Instructions and Leading Questions

We have also reviewed the remaining issues raised on appeal and deem them to be without merit. In our discretion, we do not address them further. See State v. Carter, 776 P.2d 886, 888 (Utah 1989).

VI. CONCLUSION

Farr's subsequent employment with the Attorney General did not mandate disqualification because there was no attorney-client relationship between him and Larsen that would have created a conflict of interest. Expert opinion on the issue of materiality was admissible as fact-oriented testimony concerning an element of the government's prima facie case. The trial court did not abuse its discretion in admitting evidence of entities other than EFF Fund because of their relevance to the issues of securities fraud. Larsen did not object to the character evidence complained of, and thereby failed to preserve the issue for appeal. The culpable mental state of securities fraud is willfulness and the trial court's instruction on the element was proper.

Accordingly, Larsen's conviction and sentence are affirmed.

Russell W. Bench,
Presiding Judge

I CONCUR:

Norman H. Jackson, Judge

I CONCUR IN PARTS II(A), IV(B), V(A), AND V(B), AND OTHERWISE CONCUR ONLY IN THE RESULT:

Gregory K. Orme, Judge

Tab B

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Telephone: (801) 532-7282

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

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STATE OF UTAH,	:	
Plaintiff,	:	DEFENDANT'S REQUESTED JURY INSTRUCTIONS
v.	:	
C. DEAN LARSEN,	:	
Defendant.	:	Case No. 891900927 Judge Leonard H. Russon

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Pursuant to Rule 19 of the Utah Rules of Criminal Procedure, C. Dean Larsen, by and through his counsel of record, hereby requests that the following jury instructions be given by the Court in this case.

Further, the Defendant requests leave to offer such other additional instructions as, during the course of the trial, become appropriate.

1. The Court's usual instructions on the following subjects:

   a. Verdict/Jury's responsibility.

   b. Province of the court.

   c. Province of the jury.

INSTRUCTION NO. 4

The crimes charged in this case are serious crimes which require proof of specific intent before the Defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the prosecution must prove beyond a reasonable doubt that the Defendant willfully did an act which the law forbids, or willfully failed to do an act which the law requires, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.

Refused-jeff

1 U.C.A. §§ 61-1-1(2) and 61-1-21.

2 1 Devitt and Blackmar, Federal Jury Practice and Instructions, § 14.03 (3d ed. 1977).

3 Troutman v. U.S., 100 F.2d 628, 632-33 (10th Cir. 1939).

4 Sparrow v. U.S., 402 F.2d 826, 828-29 (10th Cir. 1968).

5 Holdsworth v. Strong, 545 F.2d 687, 693 (10th Cir. 1976), cert.denied, 430 U.S. 955 (1977).

6 Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976).

7 U.S. v. Pomponio, 429 U.S. 10, 11-12 (1976).

8 Liparota v. U.S., 471 U.S. 419, 422-23, 433-34 (1985).

9 State v. Facer, 552 P.2d 110, 111 (Utah 1976).

10 State v. Haas, 675 P.2d 673, 678 (Ariz. 1983).

11 U.S. v. Pearlstein, 576 F.2d 531, 537 (3d Cir. 1978).

12 U.S. v. Payne, 474 F.2d 603, 604 (9th Cir. 1973).

13 U.S. v. Danser, 26 F.R.D. 580, 588 (D.C. Mass. 1959), affirmed Danser v. U.S., 281 F.2d 492 (1st Cir. 1960).

INSTRUCTION NO. 5

Under Utah law, a person engages in conduct "willfully" with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

Thus, an act is done "willfully" if done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say with bad purpose either to disobey or to disregard the law.

An omission or a failure to act is done "willfully" if done voluntarily and intentionally, and with the specific intent to fail to do something the law requires; that is to say with bad purpose either to disobey or to disregard the law.

In this case, the bad purpose would be the specific intent to defraud.

given in substance

1 U.C.A. § 76-2-103(1).

2 1 Devitt and Blackmar, Federal Jury Practice & Instructions, § 14.06 (3d ed. 1977).

3 See citations from previous requested Instruction No. 4.

4 U.S. v. A. & P. Trucking Co., 358 U.S. 121 (1958).

5 Morissette v. U.S., 342 U.S. 246, 250, 252, 264 (1952).

6 Screws v. U.S., 325 U.S. 91, 101-107 (1945).

7 Hartzel v. U.S., 322 U.S. 680, 686 (1944).

8 U.S. v. Illinois Cent. R. Co., 303 U.S. 239, 242-243 (1939).

9 Murdock v. U.S., 290 U.S. 389, 393-396 (1933).

10 Hagner v. U.S., 285 U.S. 427, 429 (1932).

11 Ellis v. U.S., 206 U.S. 246, 257 (1906).

12 Marteney v. U.S., 218 F.2d 258, 263 (10th Cir. 1954), cert.denied 348 U.S. 953 (1955).

INSTRUCTION NO. 30

You are instructed that a representation made by the Defendant in good faith constitutes a complete defense to a charge of Securities Fraud. Thus, the Defendant is not guilty of Securities Fraud if he had a good faith intention to carry out a promise or representation at the time he made the promise or representation. Even if the representation were false or based purely upon speculation and caused an investor to rely upon the representation as true, it does not constitute Securities Fraud if the Defendant made the representation in good faith.

Good faith, as commonly used, means a belief or state of mind denoting honesty of purpose, or freedom from intention to defraud.

If the evidence in this case leaves you with a reasonable doubt whether the Defendant made a representation in good faith, then you should find the Defendant not guilty of Securities Fraud in regard to that representation.

1 Sparrow v. U.S., 402 F.2d 826, 828-29 (10th Cir. 1968).

2 U.S. v. Cronic, 839 F.2d 1401, 1403 (10th Cir. 1988).

3 Frank v. U.S., 220 F.2d 559, 564-65 (10th Cir. 1955).

4 U.S. v. Bane, 583 F.2d 832 (6th Cir. 1978).

5 State v. Knoll, 712 P.2d 211 (Utah 1985).

Tab C

JUN 2 2 1990

By D. Hundley

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff,	:	
vs.	:	INSTRUCTIONS TO THE JURY
C. DEAN LARSEN,	:	CRIMINAL NO. 891900927
Defendant.	:	

INSTRUCTION NO. 1

You are instructed that the defendant C. DEAN LARSEN is charged by the Information which has been duly filed with the commission of SECURITIES FRAUD (18 COUNTS). The Information alleges:

COUNT 1

SECURITIES FRAUD. On or about January 7, 1986, in Salt Lake County, Utah and in violation of Utah Code Ann., Section 61-1-1(2) and 61-1-21, the defendant, C. DEAN LARSEN, in connection with the offer or sale of any security to Carlos Flamand, directly or indirectly, willfully made an untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.

INSTRUCTION NO. 14

You are instructed that under the laws of the State of Utah a person commits securities fraud, if, in connection with the offer or sale of any security, either directly or indirectly, he willfully makes or causes to be made any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

INSTRUCTION NO. 17

You are instructed that a person engages in conduct intentionally or with intent or willfully, with respect to the nature of his conduct or to the result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

INSTRUCTION NO. 17A

You are instructed that ignorance or mistake of fact which disproves the culpable mental state is a defense to any prosecution for that crime.

The culpable mental state for the crime of securities fraud is "willfulness."

Tab D

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

* * * * *

STATE OF UTAH Plaintiff, vs. C. DEAN LARSEN Defendant.	Transcript of: Motions Case No. 89-0927

* * * * *

The above-entitled cause of action came on regularly for hearing before the Honorable Leonard H. Russon, a Judge of the Third Judicial District Court of the State of Utah, at Salt Lake County, Utah, on Tuesday, February 19, 1991, at 9:05 a.m.

APPEARANCES

For the State: ROBERT N. PARRISH
MARK J. GRIFFIN
Assistant Attorney Generals
236 State Capitol Bldg.
Salt Lake City, Utah

For the Defendant: LARRY R. KELLER
Attorney at Law
257 East 200 South #340
Salt Lake City, Utah

then a Certificate of Probable Cause should issue. Because if a question is close enough, it would be inherently unfair in our democratic society for someone to be imprisoned for months and months and months, some cases years, I suppose, for some Appellate Courts to deal with problems. We don't have that problem, fortunately, in the State of Utah. But nevertheless, that is a matter that we have great concern about. I believe that all things considered, all of the points brought up, but particularly the fact that this is a brand new statute, and the statute, the main charging statute itself is not very -- it is not very clear because it does not state whether one should intentionally or willfully make the statement but then confuses it by later on saying "The punishment will be for one who willfully does it." It sets forth what the penalty will be.

Now, I do not believe -- I believe I followed the State and 61-1-1 and combined it with 61-1-21 to find willfulness and I think that is the correct interpretation. But there is an argument that could be made, that since the charging statute itself mentioned nothing, it should have been specific intent. And that alone, over this past weekend, has given me my greatest concern. And I feel that in all fairness that it is a matter that must be resolved by the Appellate Court and

therefore I am going to grant the Petition for Certificate of Probable Cause.

I grant the Certificate of Probable Cause, which brings us to the next point of -- that is only part of the battle won as far as the state is concerned. Now, the question is, is he a security risk and should there be bail and, if so, how much?

MR. KELLER: May I address that, Your Honor?

THE COURT: You want to do it at this time, you may proceed.

MR. KELLER: Very good, Your Honor. Your Honor, Mr. Larsen came to me in August of 1988. At that time the Attorney General's Office investigation had been several months, even years in occurrence, and asked me to represent him. He was charged October 19th of 1988. He has made every single court appearance he has ever been requested to make. He has been on Pretrial Release through Pretrial Services and has never had a problem. He has been trusted and he has discharged that trust faithfully. He is a family man with eight children, lived in Utah all of his life. He is a very religious man. His family has been very supportive of him. There would be absolutely no reason in the world for him to change a course of conduct that he has undergone for the last two and a half years.

Tab E

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

* * * * *

STATE OF UTAH Plaintiff, vs. C. DEAN LARSEN Defendant.	Transcript of: TRIAL (6 of 12 days) Volume VI Case No. 891900927

* * * * *

The above-entitled cause of action came on regularly for hearing before the Honorable Leonard H. Russon, a Judge of the Third Judicial District Court of the State of Utah, at Salt Lake County, Utah, on Wednesday, June 13, 1990.

APPEARANCES

For the State: ROBERT N. PARRISH
MARK J. GRIFFIN
Assistant Attorney Generals
236 State Capitol Bldg.
Salt Lake City, Utah

For the Defendant: LARRY R. KELLER
Attorney at Law
257 East 200 South #340
Salt Lake City, Utah

Q Are you professional licensed?

A Yes, I am licensed with the State Bars of Utah and Nevada.

Q And where are you currently employed?

A I am employed with the Secretary of State's Office in Nevada as the Securities Administrator.

Q How long have you been employed there?

A Been there since '87.

Q And where did you work before you came to the Nevada Securities Commission in '87?

A I worked with the Utah Securities Division which is part of the Department of Business Regulation. Now it is called the Department of Commerce.

Q Did you have a title when you were working with the Utah Securities Division?

A Yes, sir. I was chief of registration.

Q Had you had some training before you achieved that title?

A When I was first hired by the State, I worked as a securities examiner.

Q What does a securities examiner do?

A An examiner reviews the registration forms that are filed, all the prospectuses that are part of offerings.

Q Tell the jury what the chief of registration

Q Did you also touch upon disclosures with regard to limited offerings or private placements?

A Yes, various aspects of those. For the most part, limited offerings, the disclosure in a limited offering, is established by me and the SEC in their guidelines and regulations. There are gaps in those disclosure requirements, and that is where the committee established some rules.

Q Do you feel that you are familiar with both the state and the federal requirements of disclosure in limited offerings?

A Yes, because we were examiners, we were required to keep one eye on federal requirements and another eye on the state requirements.

Q What securities -- Before we leave the North American Securities Administration Association, let me ask you how long you have been associated with that organization.

A Since working with Utah. So I started with Utah in 1982. It has been eight years.

Q What seminars or special training might you have had in the course of these eight years that helped you in your employment?

A Number of seminars. The SEC sponsors several seminars during the year. The North American Securities

compilation of the disclosure that will go to an investor. That disclosure should be everything the investor really should know or would consider important in order to make an investment decision.

Q And were you responsible to your employer to determine the adequacy of those disclosure documents that you reviewed?

A Yes.

Q And what are the types of things that you would look for in your examination of prospectuses or Private Placement Memorandums?

A There is some basic disclosure that is required under state requirements and the federal requirements. There needs to be a disclosure about the owners, the people that are putting the things together, that are going to be running the business. You need to disclose what their background is, what their qualifications are, what problems they may have had in the past.

Q Why is that important?

A Well, because your investment decision is -- it is important because the people that are going to be running the operation are the people that are pretty much going to dictate the success or failure of the operation. So you need to know about those people.

Q What else are you concerned with when you

the division if there is problems with the filings and it is not accepted. The division, if problems are discovered, we then prepare a deficiency letter, as it is called, and submit it to the correspondent.

Q Now, turn, if you would please, to the fourth page in the document and can you explain to the jury what that document is.

A This is the cover page of this prospectus. The prospectus again is the document that is supposed to contain all of the material disclosures that is intended to go to investors.

Q How large was the prospectus, do you remember?

A Well, the prospectus, including exhibits, actually was a couple of binders.

Q Briefly, will you explain, if you would, what determines what should be disclosed in the prospectus side to be used in connection with the sale of securities side?

A In determining disclosures, there are specific guidelines for what needs to be disclosed in every offering and those are further established by state law and, of course, federal law. Beyond those established guidelines, the person reviewing the registration statement or prospectus would have to make a judgment call as to whether or not under the circumstances

additional disclosures need to be made.

Q And do these disclosures vary from offering to offering?

A Yes.

Q What is the standard if a new angle comes up, how do you determine whether or not that is disclosed in the prospectus?

A Well, again, you would look for any kind of guidelines that may establish a precedent and then you just very carefully look at the operation and you determine whether or not there is a specific piece of information that an investor would consider important in making a decision. And then if you determine that there is some information, then you insist it be disclosed.

Q What is the intended use of the prospectus? Who gets the prospectus?

A The investor is supposed to receive the prospectus. This is all the representations or this is suppose to contain all of the representations that the investor should receive and should be relied on in making an investment decision.

Q So this document would contain those important facts that you talked about earlier an investor should know?

A Yes, it should contain all of the material

A Yes.

Q Are you familiar with those instruments of security?

A Yes.

Q Now, we take for granted the prospectus's language on this point, but investors were told words, in fact, that promissory notes existed evidencing the debt and then they were -- in fact, no such promissory notes existed. Do you have an opinion as to whether or not the disclosure would be important to make in this prospectus?

A Yes, it would.

MR. KELLER: Objection. Your Honor, may I suggest that is immaterial to the issues before the Court, the question as to whether or not it is important in this prospectus.

THE COURT: Overruled. He has answered.

Q (By Mr. Griffin) So this disclosure is proper in this prospectus if we assume the facts?

A Very proper, yes, essential.

THE COURT: Is this a good time to break?

MR. GRIFFIN: This is a good time to break, Your Honor.

THE COURT: We will take our noon recess. We are in recess until 1:30.

(At 12 noon, Court recessed until 1:30 p.m.)

Exhibit F. I am looking about four pages in. The pages are numbered back there on the exhibit. It is page No. 2 I want to call your attention to. And would you please read the language in paragraph small b up at the top of the page?

A "The application to be submitted to the Investment Manager by the Partnership shall include (if not already in the Investment Manager's possession) at least the following material."

Q Now, read the indented paragraph Roman numeral four.

A "A form of note and trust deed or mortgage (or amendment thereto in the case of an application for a Material Amendment to an existing loan) containing the proposed terms of the loan (or amendment)."

Q Thank you. Now, Mr. Cook, did you understand in your review of the Private Placement Memorandum the relationship that the investment manager had to EFF, Ltd.? Did you understand what the investment manager was supposed to do?

A Yes.

Q Now, considering what you have just read, Mr. Cook, if promissory notes never existed as represented in the Private Placement Memorandum, do you have an idea as to whether or not it would be proper to use this

memorandum to sell interest in EFF, Ltd. once the seller knew that such notes did not exist?

MR. KELLER: Objection, it is leading, Your Honor. Secondly, under Rule 702 it is not a subject normally necessary for expert testimony. As I previously argued to the Court, it is inappropriate to ask such question. The jury can read the information and make its own conclusion.

THE COURT: Overruled, the witness may answer. That may be answered yes or no, whether you have an opinion.

THE WITNESS: Would you ask the question again?

Q (By Mr. Griffin) Yes. If promissory notes never existed as represented in the Private Placement Memorandum, do you have an opinion as to whether or not it would be appropriate or proper to use this document in selling investments in EFF, Ltd. once the seller knew that notes didn't exist?

A It would not be proper.

Q If this memorandum were used to make initial sales to investors and then subsequently the seller knew that the promissory notes did not exist, what if anything would be required before the seller could make additional sales to those same investors?

MR. KELLER: Objection, same basis.

THE COURT: Overruled. You may answer.

THE WITNESS: When there is a material change in the operation of the company, in most cases -- well, what should happen is that an amendment should be made to the prospectus for future offerees. But also, people who have invested in the offering should be given a chance to review the material change in the company and decide whether or not they want to invest in that company.

Q (By Mr. Griffin) And will you tell the Court, please, whether or not amending this type of document is a common or uncommon practice.

A It is very common.

Q Do you review those amendments from time to time that take place in the securities industry?

A Yes.

Q And I believe that you testified, Mr. Cook, that you do not ordinarily review Private Placement Memorandums, but you do so on occasion?

A Yes.

Q And have you had an opportunity to review that document more than once?

A Yes, in preparation for the testimony, yes.

Q Let's say, Mr. Cook, that you had an opportunity to review this Private Placement Memorandum before it was used in sales. And let's say you knew the

following about the offering: Let's say that you knew that Mr. Larsen had given to the general partner's wife an interest in another partnership valued at approximately $175,000 in connection with his undertaking as a general partner. And this would be to indemnify him against losses he might incur as a general partner. Do you have an opinion as to whether or not that particular fact situation should be disclosed?

MR. KELLER: Objection. Your Honor, may we approach the bench.

THE COURT: You may.

(Off the record discussion between Court and counsel.)

THE COURT: The objection is sustained and you may continue with your examination.

MR. GRIFFIN: Thank you, Your Honor.

Q (By Mr. Griffin) Mr. Cook, let's take a situation where you have a limited partnership and there is an asset such as an interest in another limited partnership that is valued at approximately $175,000 that is given to the general partner by another individual in order to indemnify the general partner against his losses that he might incur as general partner of that limited partnership. Now, do you have an opinion as to whether or not in the offering documents those facts ought to be

PHOTOGRAPHER: Yes, I understand the rules.

THE COURT: You may proceed.

MR. GRIFFIN: Thank you, Your Honor.

Q (By Mr. Griffin) Do you recollect the facts, Mr. Cook?

A Yes, I do.

Q Do you have an opinion as to whether or not those facts ought to be disclosed in an offering document similar to that one?

A Yes, I would consider that material information that an investor would like to know.

Q You had talked earlier about compensation to insiders. Does that fall in that category?

A Yes, it is compensation but it also goes to exactly what the general partners have at risk, whether or not they have an incentive to put forth every effort to make the operation successful.

Q Now, assume also that you are examining a Private Placement Memorandum, if you will, with regard to a limited partnership. And you uncover that the general partner is actually not going to make the day-to-day decisions in that limited partnership. That will be delegated to someone else to make the important decisions and the day-to-day decisions. Would you want that to be disclosed as well?

A Yes. Again, that would be very important for an investor to know. The limited partners, or the investors in a limited partnership look to the general partner for the operation, the success of the company. And the general partner is probably the most important part of the limited partnership. And if that general partner is, in fact, not the true general partner, that would be important for an investor to know.

Q You said that you understood the role of Equity Terra, the investment manager in this particular limited partnership.

A I have read the prospectus and I know what it says about Equity Terra.

Q Let me put this question to you. Again, assume that you are looking at a limited partnership and a Private Placement Memorandum, and there was an investment manager that was supposed to make sure that certain criteria were fulfilled before loans were made from the limited partnership funds. And assume, if you will, that the investment manager never met, never operated, never exercised his prerogative or made a recommendation, would you want those facts disclosed in a disclosure document to investors?

MR. KELLER: Objection. Your Honor, the hypothetical is irrelevant to this particular case. I

would go further if the Court would allow me.

THE COURT: You may come to the bench.

(Off the record discussion between Court and counsel.)

THE COURT: Objection is overruled.

Q (By Mr. Griffin) Mr. Cook, do you remember the facts and the hypothetical situation?

A Would you ask it again?

Q Let's suppose you were examining the limited partnership in which there is an investment manager that will make certain recommendations as to how money is going to be used from the limited partnership, specifically regarding certain loan criteria. And let's assume also that the investment manager never functioned, never made those recommendations and, in fact, ever met. Would you want those facts disclosed in a disclosure document to investors?

A Yes, that would also be material. It goes to the essence of the operation and if there is a change in what is disclosed to investors, that should be -- that information should be in the prospectus to begin with and an investor should be informed of that.

Q And if there is a change that the seller realizes later on after he has used the document disclosing the investment manager will function, what is

the proper way of dealing with that?

MR. KELLER: Objection, 702.

THE COURT: Overruled.

THE WITNESS: Investors should be informed of that change and given a chance to get out of the investment.

Q (By Mr. Griffin) Now, will you pick up again State's Exhibit 41-S and can you turn to page 44. I want to make sure you are at the right location, Mr. Cook. You see the paragraph on the page that begins "Furthermore"?

A Yes.

Q Would you read that sentence to the jury?

A "Furthermore, trust deeds and other instruments of the Existing Projects, Three of which have a negative equity or a loss, will be put into the Collateral Pool with similar instruments from any new Projects to which Note proceeds are loaned."

Q Now, this sentence discloses that there are three projects, three existing projects that have a negative equity or loss; is that correct?

A Yes.

MR. KELLER: Objection, Your Honor, that is leading. That is counsel's interpretation.

THE COURT: Sustained.